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No. 94-1114

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

WILLIAM KIRKPATRICK, JR.
Petitioner,

-v-

THE STATE OF CALIFORNIA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In a death penalty trial where the guilt and penalty phases are bifurcated, may the defendant exercise his right of self-representation at the penalty phase only?

2. If so, must the defendant assert his right to self-representation before the guilt phase begins or may he await the verdict at the guilt phase and assert his right before the penalty phase begins, so long as no undue delay in the penalty phase would ensue?

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OPINION BELOW

The opinion below is the decision of the California Supreme Court which is reported at 7 Cal. 4th 988, 30 Cal. Rpr. 2d 818, 874 P.2d 248 (1994). The opinion affirmed the trial court's imposition of the death penalty following petitioner's conviction of two counts of murder and the finding of related special circumstances. A copy of the opinion is reproduced in Appendix A of the petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under United States Code, title 28, section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner relies upon the Sixth and Fourteenth Amendments. Those provisions are set out verbatim on page 3 of the petition.

STATEMENT OF THE CASE[1/]

Petitioner was convicted by jury in California of two counts of first degree murder for the murders of Jim Falconio, age 16, and Wayne Hunter, age 27. The victims worked at a Taco Bell restaurant where petitioner had formerly worked. The special circumstances of murder during a robbery, murder during a burglary and multiple murder, under California Penal Code sections 190.2(a)(17)(i), 190.2(a)(17)(vii) and 190.2(a)(3) respectively, were found to be true. The jury returned and the trial court refused to reduce petitioner's death sentence.

Prior to the jury returning its verdict at the guilt phase of the trial finding petitioner guilty of the murders, petitioner had expressed some non-specific dissatisfaction with his attorneys. The court told petitioner on June 5, 1984, that a discussion of his dissatisfaction with counsel might be premature depending on the verdicts that were pending. The court gave petitioner until the following day, when the verdicts would be known, to contemplate his intentions. Petitioner agreed to that procedure. (RT[2/] 3803-3805.) The court then took the verdicts and informed the jury that they would have a

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1. While respondent does not perceive any misstatements in the facts recited in petition, respondent does note that some important facts are omitted. Respondent, therefore, proffers additional details relating to the events of the crime and the events which led to the granting of cocounsel status. *See* Sup. Ct. Rule 15.

2. "RT" stands for the Reporter's Transcript from the state court trial.

short hiatus of one week, until June 13th, before the next phase of the proceedings would begin. (RT 3922.) After the jury was released from the courtroom, defense counsel asked for a recess until the following day to allow them to consult with petitioner about some of the problems that existed between them. The court granted the request. (RT 3923.)

On June 6, 1984, petitioner indicated that he had discussed his disagreements with his counsel and had decided he wanted to have them continue as "standby counsel" who would "advise [petitioner] in certain matters." Petitioner mentioned that he wanted to proceed in propria persona only after the court asked him specifically if that was his intention. (RT 3925.) The court asked petitioner if he would be prepared to proceed as scheduled on the following Wednesday, which was June 13th. Petitioner indicated he would like a few more days, to the Monday after the 13th, which would have been June 18th. The trial court expressed no particular concern over a continuance of a few more days than the one week it had announced. (RT 3929.)

Before the trial court ruled on the matter, defense counsel voiced some concern about the legality of allowing a defendant to go pro se at that stage of the proceeding. The deputy district attorney also was concerned about the constitutional necessity of permitting pro se representation at that stage. The deputy district attorney counseled caution and some research into the question before a final decision was made. (RT 3931-3932.) In view of the concern shown by both sides on the matter, the court took the matter under submission until Friday, June 8th. (RT 3933.)

On June 8th the trial court made its ruling. Initially, the trial court determined correctly that the penalty phase was not a separate trial under California law. (RT 3936.) After considering the matter, the trial court found petitioner's request untimely and in the exercise of its discretion denied the request to proceed pro se. (RT 3945.) The trial court found, amongst the factors considered in denying the request, that as part of his pro se request petitioner had asked for a continuance (RT 3938-3939.) In reviewing the reasons for petitioner's belated request, the trial court noted petitioner could only express general dissatisfaction with his counsel's performance without noting any specific failing other than the claim that counsel had not followed petitioner's directions in presenting the case. (RT 3940.)

Upon hearing the trial court's conclusion that his motion to proceed pro se was denied, petitioner expressed his dissatisfaction with the court's decision and further indicated he was particularly interested in going pro se so he could cross-examine witnesses. He concluded he would "not accept counsel representing me in full." (RT 3946.) When the court inquired as to petitioner's intentions, petitioner stated, "If you refuse me this pro per status, refuse me the right to cross-examine witnesses . . . refuse my right to my own argument, you will conduct this . . . penalty phase without me present in this court." (RT 3947.)

Thereafter, the trial court met with counsel in chambers and discussed the possibility of appointing petitioner as "cocounsel" and allowing him to cross-examine witnesses and argue the case to the jury. (RT 3947-3948.) When the option

of going forward in a cocounsel status was presented to petitioner, his first response was to ask if he would "be able to cross-examine and to present my own argument in my defense?" When he was told he would undoubtedly be able to cross-examine witnesses, petitioner stated, "I will accept that, your Honor." (RT 3949.) At that point defense counsel, for the first time, asked to have the matter continued to Monday, June 18th, "because we've lost several days in the discussions we've had about the defendant's pro per status." The court inquired about possible scheduling problems with the prosecution if that limited continuance was granted. The trial court decided to grant the continuance and, if necessary, run late each day to avoid any possible conflict. (RT 3950-3951.)

After participating in the cross-examination of witnesses and being permitted to personally argue his case to the jury, petitioner waived his cocounsel status and allowed trial counsel to deal with the matter of jury instructions and resume their representation of petitioner without petitioner's further direct participation in the penalty phase of the trial. (RT 4060.)

SUMMARY OF REASONS FOR DENYING PETITION

Because there is no legal or public policy support to compel the imposition of a new rule that gives criminal defendants in bifurcated death penalty trials the "absolute" right to proceed pro se when the request is first made after the guilt phase, the petition should be denied.

ARGUMENT

THERE IS NO LEGAL OR PUBLIC POLICY REASON TO CONCLUDE THAT AN EQUIVOCAL *MID-TRIAL* REQUEST TO PROCEED PRO SE IS TIMELY AND MUST BE GRANTED AS A MATTER OF CONSTITUTIONAL RIGHT

A. Petitioner's Request

As a preliminary matter, it is respondent's position that petitioner's request to proceed pro se at the penalty phase was equivocal and it was ultimately determined, after an examination of what petitioner actually desired, that he was making a limited request to cross-examine some witnesses and to be allowed to make an argument directly to the jury. Petitioner's desires were satisfied by the trial court's grant of cocounsel status.

A close examination of how petitioner's request developed makes it clear that pro se status was never his ultimate goal. On June 6, 1984, petitioner indicated that he had discussed his disagreements with his counsel and had decided he wanted to have them continue as "standby counsel" who would "advise [petitioner] in certain matters." Petitioner mentioned that he wanted to proceed pro se only after the court asked him specifically if that was his intention. (RT 3925.) The trial court took petitioner's request under submission in order to consider the matter. After reflecting on the matter, the trial court found petitioner's request was untimely and it denied the request. When petitioner heard the court's ruling he stated that he would not accept his appointed counsel

"representing [him] in full." (RT 3946.) Petitioner went on to threaten to exclude himself from further court proceedings. Petitioner made his desires clear when he told the trial court he would boycott the proceedings, "If you refuse me this pro per status, refuse me the right to cross-examine witnesses . . . refuse my right to my own argument, you will conduct this . . . penalty phase without me present in this court." (RT 3947.) It was the desire to cross-examine witnesses and make a personal argument to the jury that motivated petitioner's request for the status he, as a layman, knew as "pro per" status. When the trial court offered petitioner cocounsel status and explained that it would encompass cross-examination and argument, petitioner immediately stated, "I will accept that, your Honor." (RT 3949.) After petitioner was given the opportunity to cross-examine witnesses and make his personal argument to the jury, he relinquished any further direct participation as counsel.

While the California Supreme Court reached the legal conclusion that petitioner had invoked his right to self-representation, it is clear that the request was actually much more circumscribed. (Pet. App. 14-16.) Petitioner wanted some limited participation in the trial process which was accomplished by the grant of cocounsel status. Petitioner accepted that status as satisfaction of his limited desires. Respondent submits he should not now be permitted to contend he desired a broader role or a particular status. Petitioner got what he wanted and should not now be heard to complain.

B. Legal Grounds

Even if it is assumed that petitioner's claim is properly before this Court, petitioner has offered no legal grounds for his claim that a mid-trial request to proceed pro se is timely other than the general precepts upon which *Faretta v. California*, 422 U.S. 806 (1975) was based. (Pet. 11-16.) Respondent submits that no authority can be cited to support such a claim. This Court has not offered a definitive statement on when a request to proceed pro se is to be considered timely. However, every jurisdiction that has had to consider a "*Faretta*" request has assumed a timeliness requirement and this Court has not ruled to the contrary. No jurisdiction permits the unrestrained assertion of the right of self-representation mid-trial. Even the most accommodating jurisdictions recognize that the impanelment of a jury creates a qualitative change in circumstances and justifies judicial discretion. *See United States v. Schaff*, 948 F.2d 501, 503 (9th Cir. 1991). Clearly, in every case involving a penalty phase a jury will already have been impaneled for the guilt phase, unless the trial was a court trial. This Court in *Faretta* did impose conditions upon the right, even if invoked "[w]ell before the date of trial." *Faretta v. California*, 422 U.S. at 807. This Court ruled that the defendant had to be literate and competent and the request had to be made voluntarily. This Court also made it clear that "self-representation is not a license to abuse the dignity of the courtroom," and pro se defendants would be expected to "comply with relevant rules of procedural and substantive law." *Id.* at 834 fn. 46. It is clear that the right of self-representation was never intended to be absolute. It is subject

to invocation within the framework of rules of procedure and the general dignity to the system that is expected of an attorney. From those requirements it can be inferred that a timely invocation is required as a procedure intended to give dignity to the orderly administration of justice.

Even in the context of a pre-trial request to proceed pro se the law is clear that some level of judicial discretion is warranted. Some jurisdictions have attempted to define a bright-line as to timeliness, thereby limiting judicial discretion, by permitting pro se requests until the time the jury is impaneled. *See Jackson v. Ylst*, 921 F.2d 882, 888 (9th Cir. 1990); *United States v. Jones*, 938 F.2d 737, 743 (7th Cir. 1991); *Chapman v. United States*, 553 F.2d 886,894 (5th Cir. 1977). However, some judicial judgment as to whether a request was an unequivocal request to proceed pro se or merely a complaint about appointed counsel is still necessary. Often it is difficult to discern whether a request is one to proceed pro se or one for the appointment of different counsel.

Even petitioner's Conclusion (Pet. 17) concedes that his request could be rejected if it resulted in an "undue delay." The concession that any delay is subject to a judicial determination that it is "undue" is contrary to the notion of an "absolute" right and admits to the necessity of some procedure for evaluating that delay and its impact upon the overall criminal justice system. That is, of course, what currently exists in the State of California. *See People v. Windham*, 560 P.2d 1187, 1191 (Cal. 1977). It is also consistent with this Court's approach in permitting state criminal procedure to implement other important constitutional rights. *See Medina v.*

California, 112 S.Ct. 2572, 2576-2581 (1992) [The means of determining the competency of a criminal defendant was left to state].

No legal authority supports a claim that a criminal defendant has an absolute right to proceed pro se at any point in the legal proceedings and the need for judicial discretion in response to a mid-trial request is clearly more important that in response to a pre-trial request.

It is critical to remember that the State of California in interpreting its own statutes has made the unequivocal finding that the guilt and penalty phases of a death penalty trial are *not* separate trials, but parts of a single trial. *People v. Hardy*, 825 P.2d 781, 846-847 (Cal. 1992). Furthermore, this Court has made it clear that bifurcated trials "have never been compelled by this Court as a matter of constitutional law . . .." *Spencer v. Texas*, 385 U.S. 554, 568 (1967). A request to proceed pro se at the beginning of the penalty phase is nothing more than a *mid-trial* request which has no greater constitutional stature than any other mid-trial request. As a mid-trial request, it is within the trial court's discretion to deny as untimely.

C. Policy Considerations

Lacking any legal authority to support the radical extension of the rights of *Faretta*, petitioner nevertheless argues "[p]ractical considerations also support" his request to expand *Faretta's* coverage to include an absolute right to proceed pro se at the penalty phase of a bifurcated capital trial. (Pet. 13.) Respondent submits that petitioner's assertion is unfounded.

The imposition of an "absolute right of self-representation" (Pet. 15) at the penalty phase creates the potential for serious problems that outweigh any facially attractive policy considerations petitioner might present.[3] As noted above, even those jurisdictions which permit the pre-trial invocation of a defendant's *Faretta* right up to the time of the impanelment of a jury recognize that after that point judicial discretion is appropriate. In every case involving a penalty phase request to proceed pro se there will be an impaneled jury. Moreover, it will be a jury that has been "death qualified" after what is typically vigorous and lengthy voir dire and investigation. That process can take weeks and considerable expense to accomplish. Even more, the jury will have heard an entire death penalty trial, deliberated and handed down guilty verdicts. At that point the investment that society has in that jury is substantial. The possibility that a death penalty jury might be compromised after the guilt phase has been completed due to the delay that would inevitably be occasioned by a pro se grant and attendant circumstances must

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3. Petitioner's argument that it is a good policy to allow criminal defendants to decide after the completion of a substantial portion of the trial that they want to proceed pro se because it discourages defendants from asking to proceed pro se throughout the *entire* trial, would have equal application if made after the People's case in chief. Defendants might feel more comfortable if they were personally presenting their own defense even if they did not feel comfortable cross-examining the People's witness.

be taken very seriously.[4/] Without attempting to be exhaustive, an examination of the practical problems unique to a death penalty jury is appropriate.

Initially, mere delay has a greater potential for compromising a jury when the delay begins at the end of the guilt phase. Petitioner is not requesting a limited right to proceed pro se at the penalty phase. He is asserting that he should be given an "absolute" right to such status conditioned only on the undefined absence of "undue delay." Therefore, regardless of the length of the continuance petitioner initially requested in this case, if the right to proceed pro se were "absolute" at the penalty phase, criminal defendants would have the right to request as long a continuance as would be necessary to prepare the penalty phase. In petitioner's case the request was for 12 days even though petitioner did not call any

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4. Respondent is mindful that the rights defined in *Faretta* were not intended to benefit the state, but rather, were for the protection of the criminal defendant. Respondent accepts the objective of *Faretta* and acknowledges that certain inconveniences and disruptions will flow from the exercise of those rights. However, the People are charged with representing society as a whole and must act to ensure that, while respecting a defendant's rights, the prosecution of criminals is done expeditiously and without undue waste of public resources. By way of analogy, the federal rule that explicitly gives criminal defendants the right to represent themselves (28 USC § 1654) has been found to permit discretion in denying mid-trial requests in order to foster the "orderly conduct of a jury trial," and this Court has denied certiorari when presented with that question. *See Sanchez v. United States*, 311 F.2d 327, 333 (9th Cir. 1962), cert. den. 373 U.S. 949.

witnesses.[5] In a case involving the presentation of substantial mitigating evidence, including the possibility of psychiatric or other experts, it would not be unreasonable to expect a much longer continuance.

Following the guilt phase, the jury will have a natural desire to learn what the media and the community have to say about the case. The temptation to examine crime scenes or conduct experiments will naturally be greater after the guilt decision is made. The longer the delay the greater the chance that taint will infect the jury.

The defendant will, of course, have been found guilty of murder. He might have a considerable incentive to seek retribution from the jury. Even absent intentional attempts to influence the jury, the possibility of inadvertent contamination of the jury increases directly with the length of a continuance. The possibility that jurors' memories will begin to fade is also a possibility with the passage of substantial time.

In addition to delay that is the product of a legitimate, albeit misguided, desire on the part of a criminal defendant to control his own destiny, the possibility of the defendant having a desire to do nothing more than wreak havoc on the system is clearly more pronounced when the defendant is facing the death penalty. Under a discretionary system the trial court has more leeway in denying a defendant's pro se request when mischief

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5. It was the trial court's desire to have a break of seven days between the guilt and penalty phases. Petitioner asked for a continuance of 12 days, from June 6th until June 18th. (RT 3929.) Trial counsel was ultimately given a continuance of 10 days. (RT 3950-3951.)

is suspected. Under the "absolute" right system proposed by petitioner, the trial court would be courting per se reversal if it improvidently denied a self-representation request. That would certainly result in trial courts erring on the side of granting pro se status even when it was against their better judgment.

Compounding the potential for disruption and delay that arises when a defendant who has nefarious intentions is granted pro se status, are the consequences of revoking that status. It once again raises the potential for per se reversible error. However, assuming as we should that the decision of the trial courts will be correct, the serious question of what to do after pro se status has been revoked arises. Must former counsel be reappointed? Must former counsel be retained as standby counsel whenever a defendant facing a penalty phase goes pro se? If former counsel is retained on a standby status, must he begin the preparation of a penalty phase defense concurrent with the pro se defendant? If not, certainly he will have to be given an additional continuance if the pro se status is withdrawn or abandoned. That could double the delay. If former counsel is not reappointed, any newly appointed counsel could reasonably be expected to seek sufficient time to review the entire guilt phase record prior to initiating preparation of a penalty phase defense. With death penalty cases commonly generating thousands of pages of guilt phase transcripts, the delay could be substantial. And all the while the jury would be susceptible to influences and unavailability increasing in direct proportion to the delay.

Respondent submits that while it might be appropriate

for trial courts in some cases to extend a discretionary grant of pro se status to criminal defendants at the penalty phase, the imposition of a constitutional obligation to extend such a grant is fraught with potential disruption to the orderly administration of justice. The availability of conditional grants of pro se or cocounsel status, as was granted in the instant case, which can incorporate reasonable but firm controls on delays and disruption late in the trial, best serves the dual objectives of allowing criminal defendants some measure of control over their destiny, even when they make an untimely request to proceed pro se, while protecting the significant interests of society in the orderly conduct of death penalty trials.

CONCLUSION

Respondent submits no compelling legal or policy reasons support the radical expansion of the rights enumerated in *Faretta v. California* in a manner contrary to the universally accepted bar to unlimited mid-trial requests for self-representation. As such no "important question of federal law" is presented and this Court should deny the petition for writ of certiorari. S. Ct. Rule 10.1(c).

Dated February 23, 1995

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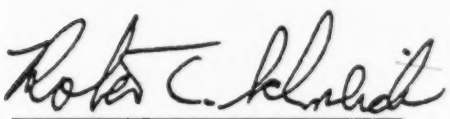

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